(7) the plaintiffs to have costs of this application before the chief registrar and here. Costs to be taxed if not agreed.

Order accordingly.

Solicitors: *Bonds*; *DF Abang Zen.*

Reported by *Al-Mansor Adabi*

Klasse Department Store Sdn Bhd v Central Development Sdn Bhd (No 2)

HIGH COURT (BANDAR SERI BEGAWAN) – SUIT NO 200 OF 1988
ROBERTS CJ
4 AND 6 AUGUST 1988

Civil Procedure – Mareva injunction – Whether can be granted in Brunei – Stare decisis

The plaintiffs sought an order to restrain the defendants and their servants or agents from removing their assets from Brunei, subject to various acts which they were permitted to do within the jurisdiction. The plaintiffs appeared ex parte before the chief registrar who refused the application. However, he continued the injunction sought which was a Mareva injunction until the matter could be argued before the Chief Justice by way of appeal. The chief registrar was satisfied that he was bound by Jones J in *Mohamed Hassan* v *Sherwood Bears (S) Pte Ltd*[1] which was upheld by the Court of Appeal. The chief registrar therefore dismissed the application for a Mareva injunction with costs to the defendants. The plaintiffs appealed.

Held, dismissing the appeal:

(1) It was not open to the court to find that there was jurisdiction in Brunei to issue a Mareva injunction.

(2) Even if there was such jurisdiction, there were no merits in the application of the plaintiffs in the instant case.

[*Editorial Note*: In this case the learned Chief Justice said that although it was not open to him to find that there was jurisdiction in Brunei to issue a Mareva injunction, 'this, in a commercial community, where assets can be readily moved into and out of Brunei, is most regrettable'. The learned Chief Justice was in favour of using the Mareva injunction which had proved to be a potent weapon in other parts of the world. He gave eight summarized arguments to support the existence of such power in the courts in Brunei and expressed the hope that at some time in the future, the Court of Appeal may decide to exercise the limited powers conferred by *Young* v *Bristol Aeroplane Company Ltd*[9] in holding that a Mareva injunction was obtainable in Brunei.]

Cases referred to

1 *Mohamed Hassan* v *Sherwood Bears (S) Pte Ltd* [1983] 2 MLJ 420 (folld)
2 *Beddow* v *Beddow* [1878] 9 ChD 89 (refd)
3 *Day* v *Brownrigg* (1878-79) 10 ChD 294 (refd)
4 *Gouriet* v *Union of Post Office Workers* [1978] AC 435 (HL) (refd)
5 *The North London Railway Co* v *The Great Northern Railway Co* (1882-1883) 11 QBD 30 (CA) (refd)
6 *Lister & Co* v *Stubbs* (1890) 45 ChD 1 (refd)
7 *Nippon Yusen Kaisha* v *Karageorgis* [1975] 3 All ER 282 (refd)
8 *The Mareva* [1980] 1 All ER 213 (refd)
9 *Young* v *Bristol Aeroplane Company Ltd* [1944] KB 718 (refd)
10 *Prince Abdul Rahman* v *Abu-Taha* [1980] 3 All ER 409 (folld)

Legislation referred to

Brunei High Court (Civil Procedure) Rules O 47
Supreme Court Act (Cap 5)

David Young for the plaintiffs.
Ferida Abang Zen for the defendants.

Roberts CJ: By a summons dated 20 July, the plaintiffs sought an order restraining the defendants, their servants or agents from removing their assets from Brunei, subject to various acts which they were permitted to do within the jurisdiction.

Mr David Young, for the plaintiffs, appeared ex parte on 20 July 1988 before the chief registrar, who refused the application. However, he continued the injunction sought (which was a Mareva injunction) until the matter could be argued before me by way of appeal.

The matter was heard further on 26 July by the chief registrar, Miss Ferida Abang Zen appearing for the defendants and Mr David Young for the plaintiffs.

After hearing argument, the chief registrar dismissed the application with costs, being satisfied that he was bound by the decision of Jones J in *Mohamed Hassan* v *Sherwood Bears (S) Pte Ltd*[1] which was upheld by the Court of Appeal in Civil Appeal No 5 of 1982. On the basis of these decisions, I had felt it necessary to dismiss an application for a Mareva injunction also in Civil Suit No 250 of 1983.

The chief registrar therefore dismissed the application for a Mareva injunction with costs to the defendants. The plaintiffs appeal today against that decision.

Decision of the Court of Appeal

I normally follow, as a matter of consistency, a decision of another judge of the High Court of Brunei. I pay much respect to decisions of the High Court or Federal Court of Malaysia, and of the Supreme Court of Singapore, since all are often concerned with a statute which is in the same terms as Brunei legislation. In none of these cases, however, am I obliged to follow the other decision.

This, however, does not apply to decisions of the Brunei Court of Appeal or of the Privy Council (and generally of the House of Lords, subject to s 2 of the Application of Laws Act, where it provides that the application of English law shall be subject to local circumstances). In such instances, I have no choice and am obliged to follow those decisions.

In Civil Appeal No 5 of 1982, which was an appeal against the refusal of Jones J in the *Sherwood Bears* case,[1] the Court of Appeal heard full argument by counsel for the appellant before dismissing his appeal with costs. The Court of Appeal apparently gave no reasons for its decision. Certainly, none can be traced and it must be assumed that none was given. This necessarily means that Jones J was upheld as to the whole of his decision in *Mohamed Hassan* v *Sherwood Bears (S) Pte Ltd.*[1]

Jones J, having decided that s 45 of the Supreme Court of Judicature (Consolidation) Act 1925 is not in force in Brunei, found that r 2 of the Preliminary Rules of the Brunei (High Court) Civil Procedure Rules did not apply, so as to import the English procedure and practice, because the grant of a Mareva injunction is a matter of jurisdiction.

In the event, Jones J concluded that, before a Mareva injunction can be granted in Brunei, there must be a corresponding provision to s 45 of the English Supreme Court of Judicature (Consolidation) Act 1925. The Court of Appeal, by dismissing the appeal, must be taken, in the absence of grounds to have approved the conclusions and reasonings of Jones J.

It is therefore, as I commented earlier in Civil Suit No 250 of 1983, not open to me to find that there is jurisdiction in Brunei Darussalam to issue a Mareva injunction. This, in a commercial community, where assets can be readily moved into and out of Brunei, is most regrettable.

Were it open to me to do so, I might well take another view as to the availability of the Mareva injunction, since the arguments, though finely balanced, seem to me to favour the use here of what has proved to be a potent weapon in other parts of the world.

I will summarize briefly the arguments which seem to me to support the argument that such a power exists:

(a) The English Judicature Act 1873 did not give the courts any powers which they did not possess before. This meant that any act which could formerly be restrained by injunction at common law or in equity could be so dealt with in any division of the High Court after 1873 – see *Beddow* v *Beddow*[2] and *Day* v *Brownrigg*.[3]

(b) The 1873 Act dealt with procedure and not with jurisdiction: see *Gouriet* v *Union of Post Office Workers*[4] at p 516 and *The North London Railway Co* v *The Great Northern Railway Co*[5] at p 36.

(c) Section 45 of the English 1925 Act, referred to by Jones J, was dealing only with procedure, not with jurisdiction, as it merely replaced s 25(8) of the English 1873 Act without altering its essential meaning.

(d) Consequently, since the form of the grant of an injunction is a matter of procedure and practice and not of jurisdiction, preliminary r 2 will apply.

(e) However, preliminary r 2 will apply, so as to enable a Brunei court to grant a Mareva injunction, only in those circumstances in which an injunction can be granted under O 47.

(f) Order 47 specifies when an injunction can be granted. English law, which is in wider terms, may not be used to extend this power. Thus it would not be correct to look at the relevant English provision (s 45 of the 1925 Act) to decide when an injunction may be granted.

(g) Whenever an injunction may be granted under O 47, a Mareva injunction can be given, since this is a matter of procedure and practice introduced into Brunei law by preliminary r 2.

(h) Since I have decided that it is correct to grant an injunction in this matter, it would have been open to me to grant a Mareva injunction, only if I were satisfied of the various matters as to which I must be sure before exercising this discretion.

It has been argued that, nevertheless, even if I am bound by the Court of Appeal, it is open to me to follow Donaldson J in the *Mareva* case[8] and refer the question to the Court of Appeal for hearing, meanwhile continuing the injunction until this occurs.

I do not regard this course as open to me. Donaldson J was faced with two decisions of the Court of Appeal which appeared to conflict: *Lister & Co* v *Stubbs*[6] and *Nippon Yusen Kaisha* v *Karageorgis*.[7] In such circumstances, he referred the application before him for an injunction to the Court of Appeal, meanwhile continuing the injunction: see *The Mareva*.[8] It was then open to the Court of Appeal to choose between two of its decisions which seemed to be in conflict. It chose to follow the one which favoured the grant of a Mareva injunction in appropriate cases.

I am not faced with a similar difficulty. The Court of Appeal has, so far as I know, only dealt with the possibility of granting a Mareva on one occasion, on which it decided that there is no jurisdiction to do so in Brunei.

At no time has the Court of Appeal decided that it could take a different course and grant a Mareva injunction. There is thus no conflict, as this was in England, between two previous decisions of that court.

It may be that, at some time in the future, the Court of Appeal may decide to exercise the limited powers conferred by *Young* v *Bristol Aeroplane Company Ltd.*[9] Unless it decides to do so, I must continue to follow its earlier decision that no Mareva can be granted in Brunei.

I am therefore bound to dismiss the applicant's appeal and accordingly do so.

Merits of plaintiffs' case

I have been asked, however, notwithstanding my dismissal of the appeal on the ground that I have no power to

grant a Mareva to decide whether, if I had power to do so, I would have been satisfied that the plaintiffs have established a case for the granting of an injunction on the merits.

I have already decided, in another application for an injunction by the plaintiffs, that they have a good arguable case, which should properly be the subject of an injunction.

However, before a Mareva is granted (if it is possible to do so) it is for the plaintiffs to show that there is a substantial risk that a judgment in favour of the plaintiffs would remain unsatisfied because the defendants will remove their assets from the jurisdiction, or will dissipate their assets within the jurisdiction.

The defendants are not a foreign company, but one registered in Brunei. They carry on other businesses here, among them property development, construction work and the leasing of lorries. None of its businesses appears to be conducted out of the jurisdiction. All its activities, assets and work are within the jurisdiction.

The largest director is a Brunei citizen and thus likely to remain here, as is the company itself. The shareholding of this director has increased, and that of Taiwan nationals has decreased in the past three years.

There is no evidence that, in the past, the company has sought to remove substantial assets from the jurisdiction, although a majority of its shareholders and directors are nationals of Taiwan. In this respect, there is nothing more than a bare allegation by the plaintiffs that this is possible.

An injunction of this nature is a matter of discretion. It must be given sparingly, since its effect may be deleterious to the interests of the defendants.

Assuming that the plaintiffs will recover judgment against the defendants, I do not find there to be sufficient evidence that the latter's assets might be removed from the jurisdiction, or disposed of within it so as not to be traceable or available when judgment is given: see *Rahman* v *Abu Taha*.[10]

Consequently, even if I had decided that it was open to me to issue a Mareva injunction, I would have refused to do so on the merits of the application by the plaintiffs.

The defendants should have the costs of the hearing before the chief registrar and of this appeal.

Costs should be taxed if not agreed.

Order accordingly.

Solicitors: *Bonds*; *DF Abang Zen.*

Reported by *Al-Mansor Adabi*

MALAYSIAN REPORTS

Vasan Singh v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) – SUPREME COURT CRIMINAL APPLICATION NO 1 OF 1988
ABDUL HAMID AG LP, HASHIM YEOP A SANI AND HARUN SCJJ
19 JULY AND 14 OCTOBER 1988

Criminal Procedure – Alibi – Defence of – Bare denial of charge – Whether notice has to be given – Criminal Procedure Code (FMS Cap 6), s 402A

In this case the applicant had been charged with voluntarily causing hurt under s 323 of the Penal Code (FMS Cap 45). The applicant in his defence said that he was asleep at the time of the incident. He heard noises and came out and saw some persons injured. At the trial the prosecution objected to the defence of alibi alleged to be put up by the applicant as no notice had been served on the prosecution under s 402A of the Criminal Procedure Code (FMS Cap 6). The trial magistrate agreed and in his grounds of decision he said he excluded the defence. In the event he found the applicant guilty and convicted him. The appeal of the applicant was dismissed in the High Court and he thereupon applied for the following question to be referred to the Supreme Court: Is an accused person, who gives evidence on his own behalf of a defence of alibi but who proposes to call no other witnesses in support thereof, obliged to give notice under s 402A of the Criminal Procedure Code.

Held:

(1) A distinction should be drawn between a bare denial and an alibi defence. Evidence of a bare denial is in any case always admissible. In order to distinguish one from the other the court must know the nature of the evidence.

(2) It follows that initially the court cannot prevent an accused person from giving evidence. Having heard the evidence, the trial court must then decide the nature of the evidence. If it is only evidence of a bare denial the evidence stays. If it is evidence in support of an alibi and no notice under s 402A has been given, then he must exclude that part of the evidence from his consideration of the defence evidence.

(3) On the facts of this case both the trial magistrate and the appellate judge were in error in excluding the applicant's evidence that he was not involved in the fight and that he was in bed at the material time because this was not evidence of an alibi but a mere denial. Be that as it may, there was ample evidence to support the conviction and there are therefore no grounds to make any other order.

(4) The answer to the question referred to the court is in the affirmative provided that the evidence is in support of his alibi and not a bare denial.

Cases referred to

1 *PP* v *Lim Chen Len* [1981] 2 MLJ 41 (refd)
2 *Ku Lip See* v *PP* [1982] 1 MLJ 194 (refd)
3 *Hussin bin Sillit* v *PP* [1988] 2 MLJ 232 (refd)
4 *Rangapula* v *PP* [1982] 1 MLJ 91 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 402A
Penal Code (FMS Cap 45) s 323